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No. 95-1879

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES DEPARTMENT OF AGRICULTURE,
PETITIONER

v.

CAL-ALMOND, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Respondents err in asserting that this Court lacks jurisdiction over the petition for a writ of certiorari because the Department of Agriculture did not seek review of the initial decision of the court of appeals addressing the First Amendment question presented in the petition. Br. in Opp. 2, 6, 9 (citing 28 U.S.C. 2101; Sup. Ct. R. 13.1). In its first opinion, the court of appeals held that the generic advertising program established pursuant to the marketing order for California almonds issued by the Secretary under the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. 601 *et seq.*, impermissibly burdened respondents' rights of free speech and association. In that opinion, the court expressly declined to rule on "the question of what remedy to grant to [respondents]." Pet. App. 94a. Rather, due to the "fact-

intensive nature of the inquiry" into respondents' claim for "a full refund of the assessments" imposed under the challenged marketing order, the court of appeals remanded the case to the district court for determination of an appropriate remedy. *Id.* at 94a-95a. The Ninth Circuit's initial decision was therefore interlocutory.

It has long been established that this Court "generally await[s] final judgment in the lower courts before exercising * * * certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for writ of certiorari).[1] Further, failure to seek Supreme Court review of a ruling by a court of appeals at an interlocutory stage of a case does not preclude a petitioner from raising the same issue in a

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[1] The Court "has unquestioned jurisdiction to review interlocutory judgments of federal courts of appeals * * * whose judgments are reviewable pursuant to [28 U.S.C.] § 1254(1)." R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice* 195 (7th ed. 1993). Although the Court ordinarily declines to exercise its discretionary certiorari jurisdiction to review interlocutory orders, the Court occassionally grants certiorari to review a nonfinal judgment involving a conflict on a question of law with another court of appeals, or where the nonfinal judgment raises an important question of law. See *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945); *American Constr. Co.* v. *Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 384 (1893); Stern, Gressman, Shapiro, *supra*, at 196-197. Thus, there is no merit to respondents' suggestion that either the government's petition for a writ of certiorari in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, cert. granted, 116 S. Ct. 1875 (1996) (No. 95-1184), was "premature (because the remedy had not been addressed) or the petition filed in the instant case is far too late" because it was filed after final judgment on the remedial issues. See Br. in Opp. 11.

later petition, following the entry of a subsequent final judgment by the court of appeals. *Ibid.* Indeed, the Court may consider on certiorari "'all of the substantial federal questions determined in the earlier stages of the litigation . . . ,' [including] questions raised on the first appeal, as well as 'those that were before the Court of Appeals upon the second appeal.'" *Mercer* v. *Theriot*, 377 U.S. 152, 153 (1964) (per curiam) (quoting *Reece* v. *Georgia*, 350 U.S. 85, 87 (1955), and *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 257 (1916)).[2] Accordingly, this Court has jurisdiction over the certiorari petition in this case.

2. Nor is there any merit to respondents' contention (Br. in Opp. 16-19) that the Court should not hold the petition for a writ of certiorari in the present case for disposition in light of the Court's decision in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, No. 95-1184, in which the Court has granted certiorari. 116 S. Ct. 1875 (1996). Respondents concede (Br. in Opp. 17) that the Court's decision in *Wileman Bros.* will affect the constitutionality of the marketing order at issue in this case. Respondents further acknowledge (*id.* at 17 n.8) that the Judicial Officer of the Department of Agriculture has reserved ruling on respondents' administrative petitions challenging the new creditable advertising regulation on First Amend-

[2] *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 378-379 (1965), on which respondents rely (Br. in Opp. 9, 11), does not state a different rule. The court of appeals here clearly did more by its second judgment than merely restate what it decided in its first opinion. The court not only reiterated its earlier holding, but also fully addressed the district court's resolution of the remedial issues, affirming the lower court's decision in part, and reversing it in part. Pet. App. 4a-17a.

ment grounds pending this Court's decision in *Wileman Bros.* Respondents' contentions regarding aspects of the current creditable regulation, and the pending administrative challenges thereto, are therefore not presented in this case.

Respondents also mischaracterize the way in which the almond promotion program operated during the time period relevant to this litigation. The almond marketing order authorized the Almond Board (Board) to incur expenses in carrying out its functions, and accordingly provided for the collection of assessments from handlers, determined according to the total volume of almonds handled. 7 C.F.R. 981.80, 981.81 (1992). Contrary to respondents' assertions (Br. in Opp. 6, 8, 12), the annual assessments were not broken down into components for various activities (*i.e.*, there was no "creditable advertising assessment" and no separate assessment for generic promotion and advertising activities conducted by the Board).[3] Rather, there was one assessment, covering all Board activities. 7 C.F.R. 981.81(a) (1992). As explained in our petition (Pet. 7), the former creditable advertising regulation permitted a handler to satisfy its pro rata assessment obligation either by paying the full assessment to the Almond Board, or by conducting paid brand and/or generic advertising and promotional activities for credit against the assessment. 7 C.F.R. 981.441(c)(3)(i)(A) and (B),

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[3] Further, during the crop years involved in respondents' challenge to the almond marketing program, the Board did not conduct its own advertising. Rather, it engaged only in generic almond promotion activities such as distributing almond recipes and promotional materials for school lunch programs. See Pet. App. 52a-53a.

981.441(d)(1)(i), (ii) and (iii) (1992). In that respect, all assessments imposed on handlers funded the generic advertising program for almonds.

In light of the almond promotion program's structure, and the breadth of the court of appeals' ruling below, the constitutionality of the former creditable advertising regulation is plainly included within the question presented here. As we have stated, however, "the manner in which the First Amendment applies to the particulars of the former creditable advertising regulation in the marketing order for California almonds" is of "no continuing importance." Pet. 16.[4] We therefore have urged the Court to hold our petition in this case rather than grant plenary review. *Ibid.*

Nor does the fact that the present case was initiated by respondents before *Wileman Bros.* and has "proceeded through the remedy phase" (Br. in Opp. 17) justify plenary review. Indeed, respondents offer no substantial reason for the Court to order full briefing and argument here, now that the Court has granted review in *Wileman Bros.* The court of appeals concluded in this case that the "entire assessment-funded almond promotion program" violated respondents' First Amendment rights under the test for reviewing restrictions on commercial speech announced in *Central Hudson Gas & Electric Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980). Pet. App. 67a-68a. The court of appeals then expressly relied on that First Amendment analysis in *Wileman Bros.* in reaching a similar conclusion regarding the assessment-funded promotion programs for peaches, nectar-

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[4] This case is not moot, however, because the court of appeals has affirmed the district court's order requiring the refund of past assessments. Pet. App. 17a.

ines, and plums. The petition should therefore be held pending this Court's disposition in *Wileman Bros.*

* * * * *

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be held and disposed of as appropriate in light of the disposition in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, cert. granted, 116 S. Ct. 1875 (1996).

Respectfully submitted.

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